

Aron M. Oliner (SBN: 152373)
Geoffrey A. Heaton (SBN: 206990)
DUANE MORRIS LLP
One Market Plaza
Spear Tower, Suite 2200
San Francisco, CA 94105-1127
Telephone: (415) 957-3000
Facsimile: (415) 957-3001
Email: roliner@duanemorris.com

Attorneys for International Business Machines Corporation

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

In re:

PG&E CORPORATION,

- and -

PACIFIC GAS AND ELECTRIC
COMPANY,

Debtors.

☐ Affects PG&E Corporation
☐ Affects Pacific Gas and Electric Company
☒ Affects both Debtors
** All papers shall be filed in the Lead Case,
No. 19-30088 (DM).*

Case No. 19-30088 (DM)

Chapter 11

(Lead Case)

(Jointly Administered)

**INTERNATIONAL BUSINESS
MACHINES CORPORATION'S
OBJECTION AND RESERVATION OF
RIGHTS TO ASSUMPTION OF
EXECUTORY CONTRACTS
PURSUANT TO THE PLAN AND
PROPOSED CURE AMOUNTS**

**TO THE HONORABLE JUDGE DENNIS MONTALI, UNITED STATES BANKRUPTCY
JUDGE:**

International Business Machines Corporation, on its own behalf and on behalf of its subsidiaries and affiliates (collectively "IBM"), by and through its undersigned counsel, hereby files its objection and reservation of rights to the Schedule of Executory Contracts and Unexpired Leases to be Assumed Pursuant to the Plan and Proposed Cure Amounts, dated May 1, 2020 (Exhibit B to the Plan Supplement) [Docket No. 7037] (the "Schedule of Assumed Contracts"), and, in support

thereof, respectfully states as follows¹:

BACKGROUND

1. On January 29, 2019 (the “Petition Date”), PG&E Corporation and Pacific Gas and Electric Company (collectively, the “Debtors”), as debtors and debtors-in-possession, filed voluntary cases under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”) in the United States Bankruptcy Court for the Northern District of California.

2. Prior to the Petition Date, Pacific Gas and Electric Company and IBM entered into certain agreements and related transaction documents, pursuant to which IBM provided services to the Debtors, including, but not limited to, specified licensed programs and software, hardware and software maintenance, web hosting services, Power8 Migration services, Guardium services, and consulting services (collectively, as amended, modified and supplemented, the “IBM Agreements”). IBM has continued to provide services to the Debtors post-petition, and Debtors have in part continued to pay IBM for such services.

3. On March 18, 2019, IBM Corp. filed, *inter alia*, a proof of claim [Claim No. 1499] in the amount of \$596,369.90, representing sums due and owing for maintenance, services and software under certain IBM Agreements as of the Petition Date.

4. On March 16, 2020, the Debtors filed the Debtors’ and Shareholder Proponents’ Joint Chapter 11 Plan of Reorganization, dated March 16, 2020 [Docket No. 6320] (together with all exhibits and schedules thereto and as it may be amended, modified, or supplemented from time to time, the “Plan”). Pursuant to Article VIII of the Plan, subject to, the occurrence of the “Effective Date”, as defined therein, and the payment of any applicable cure amounts, all executory contracts and unexpired leases of the Debtors shall be deemed assumed, unless any such executory contract or unexpired lease (i) was previously assumed or rejected by the Debtors, pursuant to a final order, (ii) previously expired or terminated pursuant to its own terms or by agreement of the parties thereto, (iii) is the subject of a motion to assume, assume and assign, or reject filed by the Debtors on or before the “Confirmation Date”, or (iv) is specifically designated as an executory contract or

¹ The factual background contained herein is supported by the Declaration of Mark Frazee filed and served herewith.

unexpired lease to be rejected under the Plan in the “Schedule of Rejected Contracts”. Plan, Article VIII, §8.1(a).

5. On May 1, 2020, as a part of their Plan Supplement, the Debtors filed their (i) Schedule of Executory Contracts and Unexpired Leases to be Rejected Pursuant to the Plan (the “Schedule of Rejected Contracts”), and (ii) the Schedule of Assumed Contracts [Docket No. 7037, Exhibits A and B]. No IBM Agreements are listed on the Schedule of Rejected Contracts. See Exhibit A to Plan Supplement, at p. 11 of 2063.

THE SCHEDULE OF ASSUMED CONTRACTS

6. The Schedule of Assumed Contracts identifies six (6) contracts with IBM of varying descriptions and dates, which are subject to potential assumption, and proposes a cure amount of \$353,694.10 for just one of those agreements. Schedule of Assumed Contracts (Exhibit B to Plan Supplement), at pp. 841-842, 865 of 2063.²

Non-Debtor Counterparty Name	Match ID	Contract ID	Debtor Name	Address	City	State	Country	ZIP Code	Title of Agreement	Effective Date of Agreement	Cure Amount ¹
IBM CORPORATION	1006912	CCNGSA_00238	PACIFIC GAS AND ELECTRIC COMPANY	650 HARRY RD.	SAN JOSE	CA	US	95120	NATURAL GAS SERVICE AGREEMENT	3/1/1998	-
IBM CORPORATION	1006912	SRCAST_C11755_00538	PACIFIC GAS AND ELECTRIC COMPANY	650 HARRY RD.	SAN JOSE	CA	US	95120	MSA CR 11755 IBM HARDWARE AND SOFTWARE SUPPORT	2/22/2006	-
IBM CORPORATION	1006912	SRCAST_C208_01042	PACIFIC GAS AND ELECTRIC COMPANY	650 HARRY RD.	SAN JOSE	CA	US	95120	R3 OA 4600016090	9/30/2004	-
IBM CORPORATION	1006912	SRCPDS_2700186681	PACIFIC GAS AND ELECTRIC COMPANY	650 HARRY RD.	SAN JOSE	CA	US	95120	PURCHASE ORDER #2700186681 DATED 10/31/2018	10/31/2018	353,694.10
INTERNATIONAL BUSINESS MACHINES CORPORATION	1016330	SRCDAL_01645	PACIFIC GAS AND ELECTRIC COMPANY	1177 BELT LINE ROAD	COPPELL	TX	US	75019	AGREEMENT FOR SERVICES EXCLUDING MAINTENANCE	12/22/2008	-
INTERNATIONAL BUSINESS MACHINES CORPORATION	1016330	SRCDAL_01646	PACIFIC GAS AND ELECTRIC COMPANY	1177 BELT LINE ROAD	COPPELL	TX	US	75019	CHANGE AUTHORIZATION FOR SERVICEELITE - SERVICEELITE	4/11/2014	-

7. Thus, as shown above, the Schedule of Assumed Contracts fails to identify with specificity the potential contracts between the Debtors and IBM to be assumed, generically

² According to a Certificate of Service, filed on May 6, 2020 [Docket No. 7085], a Notice of (I) Proposed Assumption of Executory Contracts and Unexpired Leases Pursuant to the Debtors’ and Shareholder Proponents’ Joint Chapter 11 Plan of Reorganization and (II) Proposed Cure Amounts, dated May 1, 2020 (the “Notice”), with an attached excerpt of the Schedule of Assumed Contracts listing IBM’s agreement(s) with the Debtors was served upon IBM. Upon information and belief, to date, IBM has not received this Notice. IBM specifically reserves its rights to object to and/or supplement this Objection to the extent that the Notice and/or its attachment differs from the Schedule of Assumed Contracts.

describing certain agreements as “Agreement for Services Excluding Maintenance” and “Hardware and Software Support”, which could account for multiple agreements between the parties. The Debtors nevertheless assert a cure amount of \$0 for all but one of those agreements.

8. Since the filing of the Schedule of Assumed Contracts, IBM has undertaken the process of attempting to identify the contracts listed therein, as well as determining the cure amounts associated with those contracts. To the best of its abilities, IBM has identified the relevant IBM Agreements and will work with the Debtors to confirm the identification of the same and any applicable cure amounts. Further, IBM believes that there are additional contracts between IBM and the Debtors, not specifically included on the Schedule of Assumed Contracts, which, pursuant to the terms of the Plan, the Debtors might intend to assume.

9. Based on the limited information provided by the Debtors, it appears that, as of May 11, 2020, the cure amounts for the combined IBM Agreements is at least \$730,519.93, exclusive of attorneys’ fees and costs, which doubles the \$353,694.10 cure amount ascribed by the Debtors. In addition to the insufficiency of the total amount of the proposed cure, IBM objects to the lack of specific cure amounts listed for the remaining individual contracts.

OBJECTION AND RESERVATION OF RIGHTS

10. While IBM does not object to the overall proposed assumption of its agreements with the Debtors, as noted above, IBM objects to the lack of specificity with respect to the agreements listed in the Schedule of Assumed Contracts. The contract descriptions contained therein, in some cases, are inadequate for IBM to ensure that it is evaluating the same agreements that the Debtors seek to assume.

11. IBM further objects to the cure amounts scheduled as they do not accurately reflect the amounts currently due under the IBM Agreements, which, as of May 11, 2020, is at least \$730,519.93, exclusive of attorneys’ fee and costs, which is far in excess of the \$353,694.10 asserted by the Debtors. Pursuant to 11 U.S.C. § 365, at a minimum, IBM is entitled to payment of \$730,519.93, plus attorneys’ fees and costs, in order for the Debtors to assume the IBM Agreements.

12. As noted above, IBM continues to provide post-petition services to the Debtors. Further, invoices are in process and will continue to be rendered in the ordinary course for services

1 being provided post-petition. IBM disputes the cure amount as it does not take into account all
2 amounts required to be paid pursuant to Section 365(b)(1)(A) of the Bankruptcy Code, including
3 accrued and unpaid post-petition amounts and other amounts that may come due under the IBM
4 Agreements prior to the effective date of any assumption.

5 13. Section 365(b)(1) of the Bankruptcy Code provides that if “there has been a default in
6 an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or
7 lease unless, at the time of assumption of such contract or lease, the trustee . . . cures, or provides
8 adequate assurance that the trustee will promptly cure, such default. . . .” 11 U.S.C. § 365(b)(1)(A).
9 Accordingly, in order for the Debtors to assume any agreements with IBM, the Debtors must pay the
10 full and correct cure amounts.

11 14. IBM reserves all of its rights, claims, defenses, and remedies regarding the Schedule
12 of Assumed Contracts, including the right to amend, modify, or supplement this Objection and the
13 right to assert additional cure claims at any time prior to the actual assumption of its agreements with
14 the Debtors. Nothing in this Objection should be construed as a release or waiver of any claim, right,
15 or remedy arising under IBM’s agreements with the Debtors, the Bankruptcy Code, or other
16 applicable law.

17 CONCLUSION

18 WHEREFORE, for the reasons stated above, IBM objects to the Schedule of Assumed
19 Contracts as relates to its agreements with the Debtors, respectfully requests that the assumption of
20 any of its agreements with the Debtors be denied until such time as the parties thereto reach a
21 resolution as to the foregoing, reserves its rights to assert any additional objections, and respectfully
22 requests that the Court grant such other and further relief as is just and proper.

23 Dated: May 15, 2020

DUANE MORRIS LLP

24 By: /s/ Aron M. Oliner (152373)
25 Aron M. Oliner (SBN: 152373)
26 Geoffrey A. Heaton (SBN: 206990)
27 DUANE MORRIS LLP
Spear Tower
One Market Plaza, Suite 2200
San Francisco, CA 94105-1127
Telephone: 415.957.3000
Email: roliner@duanemorris.com

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

-and-

Christopher R. Belmonte
Pamela A. Bosswick
DUANE MORRIS LLP
230 Park Avenue, Suite 1130
New York, NY 10169
Telephone: (212) 818-9200
Facsimile: (212) 818-9606
Email: CRBelmonte@duanemorris.com
Email: PABosswick@duanemorris.com

Attorneys for International Business Machines
Corporation